Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ERIC A. PAGE,
Petitioner,

v.

DOMINIC MANTELLO,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 2004

QUESTIONS PRESENTED

Petitioner submitted to the State Superior trial court a post-conviction motion claiming ineffective assistance of counsel based upon defense counsel's failure to investigate evidence that established his innocence. The trial court denied the claim solely and clearly on non-substantive grounds. On habeas review, the United States District Court, Northern District of New York, found that the state trial court erroneously relied on a procedural ground. The District court nervertheless denied the claim on the merits. In so doing, it applied the AEDPA standard of review and held that the state court's adjudication was not contrary to or involved an unreasonable application of Supreme Court law. The very important questions are:

1. Whether there has been a state court adjudication of Petitioner's ineffective assistance of counsel claim "on the merits," triggering the applicable standard of review set forth in 28 USC § 2254(d)(1), when the state court based its decision on non-substantive

grounds;

2. Whether, under the applicable standard of review, counsel provided ineffective assistance when in a murder case, where the defense was mistaken identification, he failed to conduct any investigation regarding police generated reports that established that another person committed the crimes, failed to use that evidence at trial and failed to impeach only eyewitness with evidence of his prior mistaken identification of other suspects.

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PETITION FOR A WRIT OF CERTIORARI

Eric A. Page respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Order of the court of appeals (App. A) is unpublished. The Report and Recommendation and order of the district court denying the Petition for a writ of habeas corpus (App. B & C) is also unpublished.

JURISDICTION

The judgment of the court of appeals (App. A) was entered on March 19, 2004. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

"In all criminal prosecutions, the accused shall enjoy the right to *** have the Assistance of Counsel for his defense."

See page 24, infra.

The relevant portion of the Antiterrorism and Effective Death Penalty Act (AEDPA) was codified at 28 U.S.C. § 2254(d)(1-2), which reads in pertinent part as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

See, pages 12-23, infra.

STATEMENT OF THE CASE

On May 28, 1993, in the City of Schenectady, Marvin Grimsley rode his bicycle to Graig Street to buy crack cocaine. As he rode, a kid standing on the corner asked him if he was looking for anything. Grimsley responded "yes" and the two negotiate a drug deal. Grimsley bought a thirty dollar piece of crack for twenty four dollars, and the dealer agreed to collect the remainder of the money later. Grimsley rode home and smoked the piece of crack with his friend Ralph "Paco" Villanueva. Trial Minutes "TM" 681-88.

A few hours later, the dealer and another man arrived at Grimsley's house to collect the owed six dollars. However, instead of Grimsley paying the six dollars, another drug deal was negotiated, whereupon Grimsley bought another thirty dollar piece of crack for twenty dollars. The dealer agreed to return and collect the owed sixteen dollars. Meanwhile, Grimsley and Paco smoked the thirty dollar piece of crack and an additional ten pieces of which were Paco's. TM. 689-694.

The dealer and his friend returned to

Grimsley's apartment to collect the sixteen dollars. Grimsley did not have the money. He, instead, offered the dealer a bike, then a piece of crack in lieu of the owed money. The dealer refused and told him to step outside whereupon a fight ensued. When the dealer and the man fled, Grimsley returned to his apartment and resumed smoking crack with Paco. TM 694-697.

A short while later, the dealer returned to the house and agreed to take a bike in lieu of the owed money. However, when Grimsley let the dealer and two other men into the house, the dealer pulled out a gun, pointed it at Paco and asked "where's the yeah-yo?", meaning crack. Paco stated there was no more. As he turned to go into the living room, the dealer shot him in the back. The dealer then pointed the gun at Grimsley, pulled the trigger, but the gun misfired. As Grimsley turned to run, the dealer pulled the trigger again and shot Grimsley in the stomach. The three assailants fled. TM. 698-703. Villanuava died; Grimsley servived.

On May 31, 1993, Sgt. Siler of the Schenectady Police Department received

information from Patrolman Walsh, identifying Alexander Llanos as the dealer and Michael Anthony Cruz and "Joe" from Strong Street as being at Mr. Grimsley's house "partying" on the night of the shooting. See App. "D-81". This report (hereinafter "lead sheet") was not investigated by counsel or used at trial.

On June 9, 1993, Mr. and Mrs. Grimsley identified Michael Anthony Cruz as being the person that was with the dealer on the night of the shooting. See App. "D-82, D-83". However, after Mr. Cruz was questioned, it was determined that he was not involved in the shooting. See Wade Hearing Minutes pp. 229-253, 266-267. These facts were not brought out during the trial to discredit Grimsley's identification testimony of Petitioner.

The next day, on June 10, 1993, while walking down Graig Street, Petitioner was identified by Grimsley as being the dealer, via a video surveillance of the corner where Grimsley first bought crack. Petitioner was taken into custody, questioned and arrested a short time later. TM. 709-713.

Petitioner testified in his own defense at trial. He stated that on the day of the shootings, he had washed clothes at his mother's house, eaten lunch at a restaurant, and gone to a Laundromat in order to dry his clothes. Petitioner testified that he then went to a picnic, after which he went to a movie theater with a friend. Petitioner further testified that after watching a movie, he went to his girlfriend's house, where he spent the night. Petitioner specifically denied selling drugs to Grimsley on May 28, 1993, and testified that he did not shoot either Grimsley or Villanueva. TM. 905-914.

The defense at trial was that Grimsley mistakenly identified Petitioner.

On December 7, 1994, Petitioner was found guilty of second degree murder, attempted murder in the second degree and first degree assault, and sentenced to a total of 28-1/3 years to life imprisonment.

On appeal to the appellate division one of Petitioner's grounds was ineffective assistance of counsel based on various instances of inadequacies, but none being a claim that trial counsel

failed to investigate or use the lead sheet or his failure to use the incidents of prior mistaken identification. The Appellate Division, Third Department, affirmed the conviction on March 7, 1996. *See People v. Page, 225 A.D.2d 831, 638 N.Y.S.2d 985 (3rd Dept. 1996)*. Leave to appeal to the New York Court of Appeals was denied. *See People v. Page, 88 N.Y.2d 883, 645 N.Y.S.2d 457 (1996)*.

Thereafter, on September 18, 1997, Petitioner wrote trial counsel, Adam G. Parisi, inquiring into the facts surrounding his failure to utilize the lead sheet and mistaken identification evidence. See App. "D-66".

Mr. Parisi responded that he was "not able, due to the lapse of time [approximately three years]... to specifically address your questions." But, he did provide "general comments regarding the trial strategy":

> I do recall reading involuntary disclosure references to Michael Anthony Cruz. Again, I cannot offer a specific response to your concern about the identification of him by the Grimsleys. It is my recollection

that Mr. Cruz had several alibi witnesses, and that the Grimsleys did not identify him as the shooter.... [emphasis added].

See App. "D-72".

Petitioner wrote Mr. Parisi another letter because he did not provide an explanation for his failure to use the lead sheet. See App. "D-76". Mr. Parisi responded that, "[he can] not specifically recall reviewing the lead sheet attached to your letter..." See App. "D-78".

Based upon this, Petitioner submitted to the Schenectady County Court a motion to vacate his conviction pursuant to Criminal Procedure Law 440.10(1)(h), upon the ground that he was denied effective assistance of counsel when Mr. Parisi failed to investigate and use the lead sheet and prior mistaken identification evidence.

Respondent answered the motion, arguing that Petitioner raised the same issue on direct appeal to the appellate division; thus, the trial court must deny the motion pursuant to CPL 440.10(2)(a).

In a one page Decision and Order, the

Honorable Michael C. Eidens denied the CPL 440. motion without a hearing on the ground that the ineffective assistance of counsel issue "was previously raised and determined on appeal." See App. "D-79".

Petitioner submitted a habeas petition arguing, inter alia, that Mr. Parisi provided ineffective assistance of counsel for the reasons stated above. See Habeas Petition and Traverse.

Magistrate Judge Peebles issued a Report and Recommendation denying the Habeas petition in its entirety. See App. "B-3-36". Judge Peebles found that the trial court's reliance on 440.10(2)(a) was not proper because the claim differed from the direct appeal issue and that 440.10(2)(a) was not a procedural bar. Id. B-57-58, n.21. Furthermore, Peebles implicitly found that the state court did not address the merits of Petitioner's claim, writing: "Thus, any review of such claim [by the District Court] should consider the merits, according appropriate deference

to Judge Eiden's factual finding. Id.[1] Notwithstanding, Judge Peebles went on to address Petitioner's ineffective assistance of counsel claim under the AEDPA standard. In doing so, Judge Peebles found that, regarding the use of mistaken identification evidence, it was pure "conjecture" on Petitioner's behalf in claiming that Mr. Parisi was erroneous in his belief that questions of prosecution witnesses concerning the mistaken identification of another suspect would have opened the door to damaging testimony on redirect examination.

Regarding the police lead sheet, Judge Peebles found that Mr. Parisi's letter merely states that he could not recall whether he had engaged in a review of the lead sheet, and, as such, he was not ineffective. Then reviewing the ineffective assistance of counsel claims under the AEDPA, Judge Peebles

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1 However, Judge Eidens did not make any finding of facts. As stated above, Judege Eidens erroneously procedurally denied the postconviction motion.

wrote:

> Thus, even reviewing the merits of this claim, I find that Page has not presented any evidence, in either his petition or reply that indicates that the Third Department's finding that petitioner's trial counsel did not render ineffective assistance in the manner suggested by Page in his Article 440. motion was either contrary to, or constituted and unreasonable application of, Strickland. Accordingly, I recommend that this aspect of his petition be denied.

See Id. at B-61.

Despite the clear error of Judge Peebles applying the AEDPA standard when there was never an adjudication of the claim in state court "on the merits," the Honorable Thomas J. McAvoy denied the habeas petition and refused to grant a Certificate of Appealability on this issue. See App. "C-64-65".

The United States Court of Appeals for the Second Circuit denied Petitioner's request for a certificate of appealability. See App. "A-1-2". A

motion to file an out of time petition for a panel rehearing, and the actual petition for a panel rehearing, is pending before the court of appeals.

REASONS FOR GRANTING THE WRIT

This petition presents two very important questions. The first being the applicability of the AEDPA as determining the appropriate standard of review to consider habeas corpus claims under. The second being defense counsel's representation of Petitioner during trial. For the reasons stated below, this Honorable Court should grant the Writ and summarily remand the matter to the district court, or, alternatively, allow further briefing on the matter.

I. There Has Not Been A State Court Adjudication Of Petitioner's Ineffective Assistance Of Counsel Claim "On The Merits," Triggering The Applicable Standard Of Review Set Forth In 28 USC § 2254(d)(1), When The State Court Based Its Decision On Non-Substantive Grounds.

A. Clear Error Regarding Applicability of § 2254(d)

1. The law in the Second Circuit is settled. The threshold inquiry on habeas review is what standard of review will the federal court consider a state defendant's constitutional claims under. There are two: the "pre-AEDPA" standard and the "AEDPA" standard. The pre-AEDPA standard required federal courts to conduct a de novo review of mixed questions of law and fact to determine whether the state violated any laws of the United States. *See 28 U.S.C. § 2254(d)(1994 ed.)*. The AEDPA standard was enacted on April 26, 1996. That standard requires the federal courts to conduct a more deferential review to determine if the state court's adjudication of the federal claim was "contrary to," or involved an "unreasonable application of," clearly established Supreme Court law. *28 U.S.C § 2254(d)(1)(as amended 1996)*.

2. The AEDPA standard of review will apply only when the state court "adjudicate[s]" the federal claim "on

the merits."[2] A "state court 'adjudicate[s]' a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment." *Sellan v. Kuhlman, 261 F.3d 303 (2nd Cir. 2001)*. The term "adjudicated on the merits" has been defined by the Second Circuit. The term means "a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Id at 311 (citing Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001))*.

In analyzing this two-part test, the Second Circuit considers: "(1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance

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2. If there was no state court adjudication of the claim "on the merits" the federal courts will apply the pre-AEDPA's less deferential standard. See Pg. 17, infra.

upon procedural grounds rather than a determination on the merits." *Sellan, supra, at 314 (quoting Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir. 1999))*.

3. The facts here are simple and established. Petitioner submitted a post-conviction motion to the Schenectady County Court. He contended that Mr. Parisi provided ineffective assistance of counsel by failing to investigate a police lead sheet that established other individuals committed the murder and assaults. Petitioner further contended that Parisi failed to use evidence of prior mistaken identification of the prosecution's only eyewitness, Marvin Grimsely, to impeach that testimony. Judge Eidens summarily "den[ied] defendant's motion pursuant to CPL 440.10(2)(a)."[3] App. D-79. Magistrate Judge Peebles found that the state record did not support Judge Eidens' reliance on CPL 440.10 (2)

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3. CPL § 440.10(2)(a) provides that "the court must deny a motion to vacate a judgment when: the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment ...."

(a). *See App. B-58.*[4]

4. The Second Circuit's application of settled law to the established facts is clearly erroneous. According to the clear meaning of an "adjudication of the claim on the merits," as defined in *Sellan, supra*, the state court never adjudicated the ineffective assistance of counsel claims "on the merits." Judge Eidens disposed of the claim pursuant to CPL 440.10(2)(a), which, although not a procedural ground, is a non-substantive ground. It is a non-substantive ground because it precludes the court from addressing the merits of the claim. Furthermore, Judge Peebles

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4. Judge Peebles, relying on *Taylor v. Kuhlmann, 36 F.Supp.2d 534 (E.D.N.Y. 1999)*, held that Eidens' reliance on CPL 440.10(2)(a) is not a procedural default, it is one of prior decision, and, therefore, he "cannot find that Judge Eidens 'clearly and expressly' dismissed Page's Article 440. motion due to his procedural default." See Report & Recommendation App.B-58, n.21. Judge Peebles went on to "consider [the] merits, according appropriate deference to Judge Eidens factual finding." Id. Because Judge Eidens relied on 2-a, he did not make any findings of facts. The post-conviction motion was summarily denied.

held that the issue was, in fact, not rasied on direct appeal. Thus, there was never an adjudication of the claim on the merits. Therefore, the correct standard of review is governed by the pre-AEDPA. *See Boyette v. Lefevre, 246 F.3d 76, 89, 91 (2nd Cir. 2001)*. Clear error was committed.

5. This Honorable Court should grant this petition and remand to the court of appeals for review of the federal claims under the pre-AEDPA standard.

B. <u>The Applicability of AEDPA Is A Novel Question And One Of Exceptional Importance</u>

6. The facts of this case are of first impression. The court in *Sellan* squarely addressed the applicability of § 2254(d) as it relates to summary denials by state courts. In *Sellan*, appellate counsel raised two issues related to improprieties of the prosecutor. Counsel did not raise the preserved issue of whether the trial court erred in failing to submit the murder and manslaughter counts in the alternative. The appellate division affirmed.

The defendant submitted a coram nobis arguing that appellate counsel was ineffective for not raising that preserved issue on appeal. The appellate division summarily denied the coram nobis: "Ordered that the motion is denied." The question in Sellan was whether the state court's decision as to the coram nobis claim constituted an adjudication "on the merits" within the meaning of § 2254(d), even when the state court does not explicitly refer to the federal claim or to relevant federal case law. The court found an adjudication on the merits.[5]

In *Aparicio v. Artuz, 269 F.3d 78 (2nd Cir. 2001)*, several weeks after Sellan was decided, Judge McLaughlin confronted a similar situation. The defendant submitted a coram nobis to the appellate division contending ineffective assistence of appellate counsel because counsel failed to argue ineffec-

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5. The First Circuit decided a case with a similiar factual setting. See DiBenedetto, infra. However, the First Circuit ruled directly opposite of Sellan, applying the "pre-AEDPA" standard of review.

tive assistance of trial counsel. The appellate division summarily denied the coram nobis, stating only, "appellant has failed to establish that he was denied the effective assistance of appellate counsel"(pg. 87), not mentioning defendant's claim of ineffective assistance of trial counsel with regard to the eyewitness identification charge. Judge McLaughlin found an adjudication on the merits and applied the AEDPA standard because there was nothing in the appellate division's decision "to indicate that the claims were decided on anything but substantive grounds." Id at pg. 94.

Five months later, Judge Miner addressed the same issue in *Brown v. Artuz, 283 F.3d 492 (2nd Cir. 2002)*. In Brown, the trial court closed the courtroom to allow the oficer to testify. The defendant was convicted and appealed. On appeal, the appellate division affirmed and did not specifically mention Browns' constitutional claim. The court applied the AEDPA standard, holding consistent with Judge McLaughlin and Walker in Sellan and Aparicio. Judge Miner wrote:

> Because there is no basis either in the history of the case or the opinion of the Appellate Division for believing that Brown's Sixth Amendment claim was denied on procedural or any other non-substantive grounds, we find that his claim was "adjudicat[ed] on the merits" by the state court, and therefore review his Sixth Amendment claim under the more deferential standard set forth in § 2254.

Brown, supra at 498.

Finally, only five days after the Brown case was decided, Judge Kearse decided *Rudenko v. Costello, 286 F.3d 51 (2nd Cir. 2002)*. In *Rudenko*, a consolidation case, the Court was confronted with several state court cases, where the appellate division's affirmance of the conviction made it impossible to discern its conclusion on the federal issues. With regard to those defendants where the appellate division summarily denied the claims presented to them by stating "the defendant's remaining contentions lack merit or are unpreserved for appellate review," the court of appeals held: "Because the state court may not have decided these claims on

their merits, no AEDPA deference by the district court on these claims was warranted." pg 71.

7. This case presents a different set of facts than the above decisions. Here, the state court clearly relied on a state procedural rule and did not reach the merits.[6] Unlike those cases, here the federal district court was the first and only court to review Petitioner's ineffective assistance of counsel claim. In *Sellan*, *Aparicio*, *Brown*, and *Rudenko* the court of appeals only dealt with summary denials by the state court or denials where it was not clear whether the state court considered the federal claims. Here it is clear that the state court did not consider the merits. As a matter of fact, no other circuit has decided a case with a similar factual scheme. See part C, infra. Therefore, this Court should grant review to determine, under this

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6. The question of whether or not CPL § 440.10(2)(a) is a procedural ground is not germain to the ultimate issue here because the state court was incorrect in applying that provision.

set of facts, what standard of review should apply.

8. Moreover, the question of what standard of review should apply is one of exceptional importance because New York State courts are not properly determining federal claims and are forcing federal courts to deal with federal questions. *See Taylor v. Kuhlman, supra.* (finding that the New York State court incorrectly relied on CPL 440.10(2)(a)).

10. Review should be granted.

C. Conflict Among Circuits -- Review Should Be Granted To Settle Conflict

11. Finally, the circuits rule differently on the issue of applicability of AEDPA. Again, this Court never addressed this issue. The First and Third Circuits apply the AEDPA standard when the state court decides the federal claim either directly or by reference to state court decisions dealing with federal constitutional issues. *See DiBenedetto v. Hall, 272 F.3d 1 (1st Cir. 2001); Hameen v. State of Delaware, 212 F.3d 226 (3rd Cir.*

2000).

The Second, Fourth, Fifth and Eleventh Circuits apply the AEDPA standard when the state court reaches the federal claim substantively, rather than procedurally. *See Sellan, supra; Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998); Mercadel v. Cain, 179 F.3d 271 (5th Cir 1999); Wright v. Secretary for Dept. of Corr., 278 F.3d 1245 (11th Cir. 2002).*

The Sixth Circuit is the only circuit that applies the AEDPA standard to every habeas petition, regardless of how the state court adjudicated the claim. *See Schoenberger v. Russell, 290 F.3d 831, 840 (6th Cir. 2002).*

12. In short, there has not been a state court adjudication of Petitioner's ineffective assistance of counsel claim "on the merits," triggering the applicable standard of review set forth in 28 USC § 2254(d)(1), when the state court based its decision on non-substantive grounds. The court of appeals committed clear error; the applicability of the AEDPA is a novel question and one of exceptional importance; and there is a conflict among the circuits. Accord-

ingly, review should be granted.

II. Under The Applicable Standard Of Review, Counsel Provided Ineffective Assistance

13. The Sixth Amendment guarantees a criminal defendant the right to counsel. *See U.S. Const. Amend. VI.* This Court has made the existence of an implicit Sixth Amendment constitutional right to effective assistance clear when it observed that "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441 (1970).*

14. This Court created a two-pronged test to determine whether counsel provided ineffective assistance. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. *See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1986).*

This court also discussed counsel's duty to make reasonable pretrial investigations: [C]ounsel has a duty to make

reasonable decisions that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstance, applying a heavy measure of deference to counsel's judgment. *Id., at 690-691; see also William v. Taylor, 529 U.S. 362 (2000)*(prior to sentencing, trial counsel held to have an "obligation to conduct at thorough investigation of the defendant's background").

A. The Court of Appeals Decision Conflicts With Relevant Decisions Of This Court And Other Court Of Appeals

15. Here, the district court held that Adam Parisi did not provided ineffective assistance because he could not recall whether or not he reviewed the lead sheet. *See B-60-61*. The holding is inconsistent with Strickland and Williams because the district court was suppose to assess counsel's failure to investigate for reasonableness, as this Court instructed in Strickland.

16. The Third, Fifth, Seventh, Eight, and Ninth Circuits found counsels assistance to be ineffective under similar circumstances.[7]

17. With respect to counsel's fail-

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7. *See, United States v. Gray, 878 F.2d 702 (3 Cir. 1989)*(finding ineffective assistance of counsel where counsel made virtually no effort whatsoever to investigate his client's case); *Bryanyt v. Scoot, 28 F.3d 1411 (5 Cir 1994)*(found that counsel's failure to interview alibi witnesses was ineffective assistance even though the defendant did not provide counsel with significant information about these witnesses until the date of his pretrial hearings); *Williams v. Washington, 59 F.3d 673 (7 Cir. 1995)*(held that counsel's overwhelming failure to investigate the facts which would have helped him defend his client constituted ineffective assistance of counsel); *Tosh v. Lockhart, 879 F.2d 412 (8 Cir. 1989)*(held that a robbery defendant was denied effective assistance of counsel when his attorney failed to take the steps necessary to produce key witnesses at trial); *Chambers v. Armontrout, 907 F.2d 825 (8 Cir. 1990)*(held that counsel's failure to interview a key witness constitutes ineffective assistance of counsel); *Sanders v. Ratelle, 21 F.3d 1446(9 Cir 1994)*(found a clear example of ineffective assistance of counsel where a murder defendant's attorney failed to interview another person who had confessed to the killing).

ure to utilize the police lead sheet, which establishes that other suspects committed the crimes (App. "D-81"), Petitioner made diligent inquiries to obtain some sort of strategic or tactical explanation for counsel's error, but none were provided. *See, App. "D-66-76".* In fact, Parisi could not remember reviewing the only evidence which tended to totally exculpate his client -- the lead sheet. *See App. "D-76-77".*

18. An attorney's function is to act as an advocate and the advocate's task it to present the clients case with persuasive force. See, ABA Model Rules of Pro. Conduct, 3.3, Comment.; see also, Model Rule, 1.3 ("A lawyer should act with zeal in advocacy upon [his] clients behalf ...."); cf., People v. Flores, 84 N.Y.2d 184, 191 (diss. opp. 1994)("...a criminal defense attorney will do whatever is necessary and appropriate *** to help [his] client to avoid an unfavorable adjudication or to escape punishment [authorities cited]").

19. Therefore, in light of the aforesaid mentioned, because counsel could not offer a "strategic or other legitimate explanations" for his failure

to utilize the lead sheet, and because there is a "reasonable probability" that the outcome of the trial would have been different, Petitioner must succeed on his claim of ineffective assistance of counsel.

20. Parisi was also ineffective for failing to use evidence of prior mistaken identification. The Seventh and Eleventh Circuits have found counsel to be ineffective for the same type of representation that Petitioner received.[8]

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8. *See, Moffett v. Kolb, 930 F.2d 1156 (7 Cir 1991)*(finding that murder defendant was denied effective assistance of counsel when his trial attorney failed to introduce prior inconsistent statements of a witness whose testimony at trial incriminated the defendant); *Nixon v. New some, 888 F.2d 112 (11 Cir 1989)*(found that a murder defendant received ineffective assistance of counsel where his trial attorney failed to impeach the victim's wife by introducing her testimony from an earlier trial in which a different person was charged with the same killing); *Smith v. Wainright, 741 F.2d 1248 (11 Cir. 1984)*(found that sufficient doubt existed regarding the effectiveness of a murder defendant's trial counsel that an evidentary hearing sould have been held by the district court).

21. Therefore, Petitioner's ineffective assistance of counsel claim should have been reviewed under the pre-AEDPA standard of review and the below court sbould have found counsel to be ineffective under that standard.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Eric Page

Eric Page 95A1200
Pro-se
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June 10, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 03-2342

[Filed on March 19, 2004]

ERIC PAGE,
Petitioner-appellant

v.

DOMINIC MANTELLO,
Repondent-Appellee.

Present: Hon. Robert. D. Sack,
Hon. Sonia Sotomayor,
Hon. Reena Raggi,
Circuit Judges.

Appellant, pro se, moves for a certificate of appealability. Upon due

consideration, it is **ORDERED** that the motion is denied and the appeal is dismissed. The appellant has not made a "substanial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By:/s/_____
Lucille Carr

APPENDIX B

UNNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 9:98-CV-1916 (TJM/DEP)

[Filed December 4, 2002]

ERIC PAGE,

Petitioner,

-vs-

DOMINIC MANTELLO,

Respondent.

U.S. MAGISTRATE JUDGE: DAVID E. PEEBLES

REPORT AND RECOMMENDATION

Petitioner Eric Page, a New York State prison inmate as a result of a 1994 Schenectady County Supreme Court conviction for murder in the second degree, attempted murder in the second

degree and assault in the first degree, has commenced this proceeding seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. In his petition, Page raises five separate grounds for relief. Respondent opposes the petition, arguing that it should be rejected on the merits. For the reasons set forth below, I recommend that the petition be denied.

I. BACKGROUND

According to the testimony adduced at trial, the events leading up to the shooting in issue began sometime after 2:30 p.m. on Friday, May 28, 1993, when Marvin Grimsley - one of the two shooting victims - went to Craig Street in Schenectady, New York in order to purchase some crack cocaine. See Transcript of Trial of Eric Page (11/22/94)("Trial Tr.") at 680-82. Page called out to Grimsley and proceeded to sell him a $30.00 piece of crack cocaine for $24.00.[1] Grimsley returned to his

1. Page indicated that he knew Grimsley as the individual who sold and repaired bicycles in the neighborhood. Trial Tr. at 684. Id. at 682-84.

home, and was soon joined by his friend, Ralph Vilaneuva, whereupon the two men proceeded to smoke the crack cocaine. Id. at 685-86. After a period of time, petitioner and another man arrived at Grimsley's home; Grimsley let them in and Page indicated to Grimsley that he could sell him another $30.00 piece of crack cocaine. Id. at 646, 689-690. Grimsley and Vilaneuva volunteered that they each could pay $10.00 toward the purchase price; petitioner agreed to sell them the crack cocaine on the condition that they pay the balance due at a later time. Id. at 690. The two then purchased and smoked the additional crack cocaine. Id. at 648, 693.

Later on that evening, Grimsley answered the door to his home and was confronted by Page, who demanded full payment of the drugs he had sold earlier Grimsley. Id at 648, 694-95. Grimsley offered, inter alia, to provide petitioner with a bicycle as collateral for his prior purchases, with the understanding that Grimsley would pay Page in full for the crack cocaine the next day. Id at 694. Page, however, declined that offer and requested that Grimsley step

outside of his home. Id at 695. Grimsley agreed, and was thereafter assaulted by petitioner and another individual. Id at 696.

After leaving the Grimsley residence, Page soon returned and informed Grimsley that he would accept a bicycle as payment of the crack cocaine. Id. at 650-53, 699. Grimsley then allowed petitioner - now accompanied by two other individuals - into his home. Id. at 700-01. After a brief conversation; Page asked Vilaneuva where the drugs were, when Vilaneuva responded that there was no crack cocaine remaining, petitioner asked Vilaneuva if he wanted to die. Id. at 701. Page then aimed a gun a Vilaneuva, shooting him in the back. Id. Petitioner then pointed the gun at Grimsley and pulled the trigger; this time, however, it did not fire. Id. at 702. As Grimsley ran toward a bathroom, petitioner successfully fired the gun, hitting Grimsley, and thereafter left the scene. Id. at 655, 702. Grimsley informed his wife that he had been shot, and was taken to a hospital where he was treated by Dr. Lyle Barlyn. Id. at 655-56, 799.

Dr. Barlyn testified that the gunshot wound sustained by Grimsley was "life threatening." Id. at 802-03. Timothy Farry, a firefighter and paramedic with the Schenectady Fire Department, testified that when he arrived at the scene of the crime at 12:30 a.m. on May 29, 1993, Vilaneuva had no pulse, no blood pressure, and was not breathing.[2] Id. at 523.

On May 30, 1993, Robert Mchugh, a detective with the Schenectady Police Department, met with Grimsley at the hospital. Id. at 618. At that time, Grimsley provided Detective McHugh with a description of his assailant, which included the fact that the perpetrator had a scar on his face. Id. at 619, 691.

On June 10, 1993, Grimsley accompanied Detective McHugh and other members of the Schenectady Police Department as they continued their investigation into

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2. Vilaneuva was subsequently pronounced dead by Dr. T. Oram at 1:30 a.m. on May 29, 1993, with the cause of death listed as "fatal gunshot wound." See Postmortem Protocol No. N-93-54 (attached to Indictment no. 593-15); see also Trial Tr. at 752-57.

the shooting. Id. 620. After conducting approximately two hours of surveillance of a store in the Craig Street area of Schenectady, New York, Grimsley identified Page, who was then taken into custody and advised of his Miranda[3] rights by Detective McHugh. Trial Tr. at 623-24.

Prior to questioning Page at the police station, Detective McHugh provided petitioner with a document which listed each of Page's Miranda rights. Petitioner then initialed each sentence contained within that document as Detective McHugh again read petitioner his Miranda rights. Id. at 625-26. Page reused, however to sign the form, instead choosing to initial Detective McHugh's statement at the end of the form indicating that petitioner "efused to sign at this time." Id. at 626. Following the discussion regarding his Miranda rights, Page proceeded to inform Detective McHugh that on May 28, 1993, he had gone to the movies with a friend to watch the movie "Menace to

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3. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Society," and that following the movie he went to his girlfriend's house. Id. at 628-29. Petitioner was unable, however, to recall his whereabouts on June 5, 1993 or June 7, 1993. Id. at 628.[4]

Page testified in his own defense at trial, and provided additional details concerning his alibi. Specifically, he stated that on the day of the shootings, he had washed clothes at his mother's house, eaten lunch at a restaurant, and gone to a Laundromat in order to dry his clothes. Id at 905. Page testified that the he then went to a picnic, after which he went to a movie theater with a friend. Id at 910-11. Petitioner further testified that after watching a movie, he went to his girlfriend's house, where he spent the night. Id. at 911-12. Petitioner specifically denied dealing drugs to Grimsley or Vilaneuva. Id. at 914. Page also testified that he could not

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4. At some time while Page was in police custody, two photographs were taken of him, which photographs revealed that petitioner had a scar on the side of his face. Id at 609-10, 790.

recall what he had done on May 26, 27, 29, 30, 31, 1993, or June 1, 2, or 3, 193. Id. at 968-70.

II. Procedural History

A. State Court Proceedings

Petitioner was indicted by a Schenectady County grand jury of the crimes of second degree intentional murder (in violation of NY. Penal Law § 125.25(1)); second degree depraved indifference murder (in violation of NY Penal Law § 125.25(2)); second degree felony murder (in violation of NY Penal law §125.25(3)); second degree attempted murder (in violation of NY Penal Law §§ 110.00, 125.25(1)and(3)); first degree assault (in violation of NY Penal Law § 120.10); and first degree burglary (in violation of NY Penal Law §§ 140.30(1)-(4)).

A jury trial was subsequently conducted in connection with those charges in Schenectady County Court beginning on November 22, 1994 before Schenectady County Court Judge Clifford T. Harrigan.

At the conclusion of that trial, Page was found guilty of the intentional

murder of Vilaneuva, attempting to murder Grimsley, and assaulting Grimsley, but was acquitted of the burglary charge. Id. 1217-20.

As a result of that verdict Page was sentenced on December 21, 1994, by Judge Harrigan to twenty years to life imprisonment on the intentional murder conviction, eight and one-third to twenty five years imprisonment on the attempted murder conviction (to run consecutively with the sentence for the murder conviction), and four to twelve years imprisonment on the assault conviction (to run concurrent with the other sentences imposed on petition), resulting in an aggregate sentence of an indeterminate term of twenty-eight and one third years to life imprisonment. See Sentencing Transcript (12/21/94) at 35-36.

Page appealed his conviction to the New York State Supreme Court, Appellate Division, Third Department, alleging that 1) the statement made by him to the police should have been suppressed: 2) the prosecution failed to prove his guilt beyond a reasonable doubt; and 3) he received ineffective assistance of

counsel during both the pre-trial proceedings and his criminal trial. See Appellate Brief of John D. Charles, Esq. (7/28/95). The Third Department affirmed the conviction and sentences in all respects. *People v. Page 225 A.D.2.d 831, 638 NYS2d 985 (3rd Dept. 1996)*. Leave to appeal to the New York State Court of Appeals was subsequently denied. *People v. Page, 88 NY2d 883, 645 NYS2d 457 (1996)*.

On May 6, 1997, Page filed an application for a petition seeking a writ of error coram nobis. In that application, petitioner faulted his appellate attorney for, inter alia, failing to argue that 1) Page's guilt was not proven beyond a reasonable doubt,[5] and 2) the photographs taken by the police which depicted Page as having a "mark" on his right cheek were obtained pursuant to an illegal arrest and improperly allowed into evidence by Judge Harrigan. See Coram Nobis Application. On July 25, 1997, the Third

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5. Petitioner contends that his appellate attorney briefed this issue "poorly." Coram Nobis Application at 3.

Department denied Page's Coram Nobis application. *See People v. Page, No. 7965 (3d Dept. July 25, 1997).*

On January 30, 1998, petitioner filed a pro-se motion to vacate the judgment of conviction pursuant to NY Criminal Procedure Law § 440.10, claiming that he received ineffective assistance of trial counsel. See Motion to Vacate Judgment of Conviction (2/2/98). In denying that application, Schenectady County Court Judge Michael C. Eidens found that the issue raised by Page in that motion - ineffective assistance of trial counsel - had been "previously raised and determined on appeal." See Decision and Order of Judge Eidens (5/12/98)("May, 1998 Decision and Order"). Id. Petitioner's application for leave to appeal that decision to the Third Department was thereafter denied. *People v. Page, No. 10817 (3d Dept. Nov. 23, 1998).*

B. <u>This Action</u>

Petitioner's petition for habeas relief pursuant to 28 U.S.C. § 2254 was

filed in this district on December 14, 1998. Dkt. No. 1.[6] Petitioner raises five distinct grounds for relief, including 1) denial of a fair trial, in light of the trial court's refusal to suppress the statement petitioner had given to the police; 2) insufficiency of the evidence; 3) ineffective assistance of pre-trial and trial counsel' 4) ineffective assistance of appellate counsel; and 5) the wrongful denial by the state court of Page's Article 440 motion. The office of the Attorney General for the State of New York, acting on respondent's behalf, subsequently filed an answer and memorandum in opposition to the petition, and has provided the court with the majority of the records associated with the relevant state court proceedings. Dkt. Nos. 10-11. Petitioner has since responded to those submissions by filing a "traverse" on July 9, 1999. Dkt. No. 12.

The matter, which has since been

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6. An earlier petition filed by Page in this district on July 21, 1997 [No. 97CV1141(FJS/DRH)] was dismissed without prejudice, apparently based upon the inclusion of unexhausted claims in that petition.

reassigned to me, is now ripe for determination, and has been referred to me for the issuance of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72. 3(c). See also Fed. R. Civ. P. 72(b).

III. Discussion

A. Standard of Review

Enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) brought about significant new limitations on the power of a federal court to grant habeas relief to a state court prisoner under 28 U.S.C. § 2254. Those new standards apply to petitioner filed after the AEDPA's effective date even though they relate to convictions which predate enactment of the AEDPA. *Williams v. Taylor, 529 US 362, 402, 120 S.Ct. 1495, 1518 (2000); Boyette v. LeFevre, 246 F.3d 76, 88 (2d Cir. 2001).*

Under the AEDPA, a federal court may not grant habeas relief to a state prisoner on a claim

that was adjudicated on the merits

in State court proceedings unless the adjudication of the claim -

> 1) resulted in a decision that was contrary to, or involved an unreasonable application, of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on a unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); see also Noble v. Kelly, 246 F.3d 93, 98 (2nd Cir. 2001), cert. denied, _____ U.S. _____, 122 S.Ct. 197 (2001); Boyette, 246 F.3d at 88. The AEDPA also requires that in any such proceeding "a determination of a factual issue made by a State court shall be presumed to be correct [and t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *28 U.S.C. §2254(e)(1); see also Boyette, 246 F.3d at 88 (quoting § 2254(e)(1)) (internal quotes omitted).*

The Second Circuit has provided additional guidance concerning application of this test, noting that

> [u]nder AEDPA, we ask three questions to determine whether a federal court may grant habeas relief: 1) Was the principle of Supreme Court case law relied upon in the habeas petition "clearly established" when the state court relied? 2) If so, was the state court's decision "contrary to" that established Supreme Court precedent? 3) If not, did the state court's decision constitute an "unreasonable application" of that principle?

Williams v. Artuz, 237 F.3d 147, 152 (2nd Cir. 2001)(citing Williams and Francis S. v. Stone, 221 F.3d 100, 108-09 (2nd Cir. 2000)).

Because the AEDPA's restriction on federal habeas power was premised in no small part upon the duty of state courts to uphold the Constitution and faithfully apply federal laws, the AEDPA's exacting review standards apply only to federal claims which have been actually adjudicated on the merits in the state

court. *Washington v. Shriver, 255 F.3d 45, 52-55 (2d Cir. 2001).* Accordingly, deference is not mandated under section 2254(d) if a state court decides the case on a procedural basis, rather than on the merits. *See Sellan v. Kuhlman, 261 F.3d 303, 309-10 (2nd Cir. 2001).*

In Sellan, the Second Circuit answered the question of whether deference under section 2254(d) is not mandated if a state court decides a case without citing to federal law or other wise making reference to a federal constitutional claim. Specifically, that court held that deference is required if the federal claim was presented to the state court and there was an adjudication on the merits, even though the state court's decision lacks explicit reference to the federal claim or to federal case law. *Sellan, 261 F.3d at 311-12.* As the Second Circuit explained,

> the plain meaning of § 2254(d)(1) dictates our holding: For the purposes of AEDPA deference, a state court 'adjudicate[s]" a state prisoner's federal claim on

> the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court' s decision on the federal claim - even if the state court does not explicitly refer to either the federal claim or to relevant federal case law."

Sellan, 261 F.3d at 312 (emphasis added), see also Ryan v. Miller, 303 F.3d 231, 246 (2nd Cir. 2002).[7]

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7 In his opinion in Sellan, Chief Judge Walker acknowledged that enlightenment in state court decisions as to the manner of disposition of federal claims presented would greatly enhance a federal court's ability, on petition for habeas review, to apply the AEDPA's deference standard. Sellan, 261 F.3d at 312. He noted, however, that a state court's failure to provide such useful ...guidance does not obviate a federal court's duty to make the analysis and pay appropriate deference if the federal claim was adjudicated on the merits, albeit tacitly so. Id.

When a state court's decision is found to be decided "on the merits", that decision is "contrary to" established Supreme Court precedent if it applies a rule that contradicts Supreme Court precedent, or decides a case differently than the Supreme court on a set of materially indistinguishable facts. *Williams, 529 US 405-06, 120 S.Ct. at 1523.* Moreover, a federal court engaged in habeas review must also determine not whether the state court's determination was merely incorrect or erroneous, but instead whether it was "objectively unreasonable". *Williams, 529 US at 409, 120 S.Ct. at 1521 (O'Connor, J.); see also Sellan, 261 F.3d at 315.* The Second Circuit has noted that his inquiry admits if "[s]ome increment of incorrectness beyond error", though "the increment need not be great[.]" *Francis S., 221 F.3d at 111.*

B. Analysis of Page's Claims

1. Failure to Suppress Petitioner's Statement

In support of the first ground of his petition, Page argues that he was

sixteen years of age at the time he was questioned by the police, and that he was "unlawfully isolated from his immediate family members" at the time he provided his statement to the authorities. Petition (Dkt. No. 1) at 4. In support of this contention, petitioner claims that over the course of six hours, both his brother and mother were wrongfully advised by police authorities that petitioner was not at the location, despite the fact that during that period of time he was in fact at the station providing Detective McHugh with a statement. Id. at 4-5. Petitioner argues that "[b]ecause the police clearly took measures to ensure that Page would not receive any help from supportive adults during interrogation [sic], the court should had [sic] suppressed all statements derived therefrom." Id. at 5.

Prior to enactment of the AEDPA, habeas courts considering claims relating to the voluntariness of a Miranda wavier and of a confession had generally held that state court findings that a defendant was given and

understood his *Miranda* rights were presumed correct, but that the ultimate issue of the voluntariness of a waiver or confession was nonetheless subject to de novo review. *E.g. Smith v. Sullivan, 1 F.Supp.2d 206, 211 (W.D.N.Y. 1998)(citing Carter v. Johnson, 131 F.3d 452, 461-62 (5th Cir.1997); Derrick v. Paeterson, 924 F.2d 813, 822 (9th Cir. 1990), cert. denied, 502 U.S. 853, 112 S.Ct. 161 (1991))*. Under the AEDPA, however, "plac[ing] a new restriction on the power of federal courts to grantwrits of habeas corpus to state prisoners." *Williams, 529 U.S. at 399, 120 S.Ct. at 1516*. In light of the AEDPA, habeas relief may not be granted unless the state courts, in ruling on an individual's *Miranda* claims, unreasonably applied Supreme Court law. *Cruz v. Miller, 255 F.3d 77, 80 (2nd Cir. 2001)*.

In the criminal matter below, Judge Harrigan conducted a suppression hearing in order to explore the circumstances relating to petitioner's statement to the police, and concluded that his statement could be offered as evidence

against him at his trial.[8] The Third Department, in rejecting Page's challenge to Judge Harrigan's ruling regarding this issue, acknowledged the claim by petitioner's mother and brother that they has been misinformed by the authorities as to Page's whereabouts. *Page, 5 A.D.2d at 833, 638 N.Y.S.2d at 987-88.* That court found, however, that there was no evidence in the record establishing that any of the police officers deliberately concealed petitioner's location from his mother or his brother, or that Page ever asked for his family during the course of his interrogation. *Id. 225 A.d.2d at 833, 638 N.Y.S.2d at 98.* That court further determined that petitioner had been given his *Miranda* warnings, and that once he requested an attorney, all questioning on him ceased. Id. The court therefore held that Judge Harrigan did not err in denying Page's request to suppress his statement to police. Id. These determinations of the Third

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8. The court has not been provided with a copy of Judge Harrigan's decision regarding this suppression motion.

Department are entitled to deference under the AEDPA absent a finding that they are contrary to or represent an unreasonable application of established Supreme Court precedent.

a. Clearly Established Supreme Court Precedent

Under *Miranda*, "before a suspect may properly be subjected to custodial interrogation, he must be informed that he has the right to remain silent, that any statement he makes may be used in evidence against him, and that he has the right to have counsel present." *United States v. Mathurin, 148 F.3d 68, 69 (2nd Cir. 1998)(citing Miranda, 384 U.S. at 467-72, 86 S.Ct. at 1624-26))*. In considering whether a party has voluntarily provided a statement to the police, courts are to consider the "totality of the circumstances," including, inter alia, evidenceof police coercion, the length of the interrogation, the defendant's maturity and education, and whether the police failed to advise the defendant of his or her rights to remain silent and to have counsel present during the custodial interrogation. *Withrow v. Williams, 507*

U.S. 680, 693-94, 113 S.Ct. 1745, 1754 (1993). A coerced or otherwise involuntary statement may never be used for any purpose: "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law...." *Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 2416 (1978)(emphasis in original); Smith, 1 F.Supp.2d at 212*("it is clearly established that an involuntary-given confession is inadmissable in either a federal or state criminal trial"). Additionally, *Miranda* also renders inadmissable any statements given to authorities that have been induced by trickery or deception. *Berkermer v. McCarty, 468 U.S. 433, 104 S.Ct. 3138, 3146-47(1984)(citing Miranda); United States v. Male Juvenile, 121 F.3d 34, 41(2d Cir. 1997)(citing Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141(1986)).*

b. <u>Contrary to, or Unreasonable Application of, Supreme Court Precednet</u>

The Third Department, when considering Page's challenge to the admissibility of his statement to the

police, did not cite directly to Supreme Court case law in denying this aspect of Page's appeal, instead making reference solely to New York state precedent. *See Page, 225 A.D.2d at 831, 638 N.Y.S.2d at 988.* This notwithstanding, deference to the Third Department's *factual finding* that Judge Harrigan did not err in denying petitioner's request for suppression, (see Id.) is required. (*E.g. Sellan, 261 F.3d at 312*(when a state court's disposes of a claim on the merits, "a federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court's decision on the federal claim-even if the state court does notexplicitly refer to either the federal claim or to relevent federal case law"); *See also Ryan, 303 F.3d at 246.*

Page has not articulated any legal basis, in either his petition or traverse, upon which I could properly find that his statement to the authorities should have been suppressed. Petitioner has not provided any evidence to substantiate his claim that the police "clearly took measures to ensure that Page would not receive any help

from supportive adults" during his interrogation(Dkt. No.1 at 5). In this regard, I note that Page has wholly failed to rebut the factual findings of the Third Department that petitioner never asked for his family during the course of the interrogation, or that his family was not deliberately misled by authorities as to Page's whereabouts, and I am therefore required to defer to these findings of the Third Department under the AEDPA. Nor has petitioner submitted any evidence which indicates that the statement used against him at his trial (see Tr. at 628-29) was obtained after he had requested an attorney or otherwise in violation of petitioner's *Miranda* rights.

Accordingly, I find that the Third Department's conclusion that petitioner's statement could properly be used against him at his trial was neither contrary to, nor an unreasonable application of *Miranda*, Withrow, Mincey or Berkemer. Page is therefore not entitled to habeas relief under the AEDPA on this theory, and as such I recommend that ground one of the petition be denied. *28 U.S.C.* §

2254(e)(1); Mask v. McGinnis, 223 F.3d 132, 139(2d Cir. 2000).

2. Sufficiency of Evidence

In the second ground of his petition, petitioner challenges the sufficiency of the evidence against him at trial, arguing that the prosecution failed to establish his guilt beyond a reasonable doubt. Petition(Dkt. No. 1 at 5). In support of this claim, Page argues that Grimsley's testimony "was replete with inconsistent statements and, for the most part, was contradicted with prior inconsistent statements and testimony of other witnesses." *Id.* at 5-6. Petitioner further contends that"[i]t was obvious that the consumption of about $300.00 of crack in twelve hours affected Grimsley's ability to recollect" (*Id.* at 6), and that the idetification evidence offered against him was "pathetic." *Id.* Petitioner also asserts that the prosecution did not disprove his alibi beyond a reasonable doubt. *Id.* at 7.

A review of the Third Department's decision affirming petitioner's conviction reflects that his challenge to the sufficiency of evidence was

presented to and resolved against him by that court. *Page, 225 A.D.2d at 831-33, 638 N.Y.S.2d at 986-87.* Consequently, this claim is entitled to deferential review under the AEDPA.

1. Clearly Established Supreme Court Precedent

A convicted defendant seeking federal habeas review of the sufficiency of the evidence supporting that conviction bears a heavy burden. *Fama v. Commissioner of Correctional Services, 235 F.3d 804, 811(2d Cir. 2000); United States v. Brewer, 36 F.3d 266, 268(2d Cir. 1994).* A Ppetitioner making a claim is entitled to habeas relief under 28 U.S.C. § 2254 only if it is found "that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92(1097).* The reviewing court is required to consider the evidence in the light most favorable to the prosecution, and draw all inferences in its favor. *Id.*, 443 U.S. at 319, 99 S.Ct. at 2789.

Since I must conside the elements of each of the crimes of which Page was found guilty in considering his challenge to the sufficiency of evidence, *see Jackson, 443 U.S. at 324, 99 S.Ct. at 2792; Fama, 235 F.3d at 811(citing Quartararo v. Hanslmaier, 186 F.3d 91, 97(2d Cir. 1999), cert. denied, 528 U.S. 1170, 120 S.Ct. 1196(2000))*, I will first briefly review New York's Penal Law in addressing petitioner's claim.

N.Y.Penal Law § 125.25, which addresses murder in the second degree, provides, in relevant part, that "[a] person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he cause the death of such person or a third person..." *New York Penal Law § 125.25(1); see Maldonado v. Scully, 86 F.3d 32, 35(2d Cir. 1996).* "The crime of attempted second degree murder is committed when, with the intent to cause the death of another person, one engages in conduct which tends to effect commission of that crime." *Fernandez v. Dufrain, 11 F.Supp.2d 407, 414(S.D.N.Y. 1998)(citing N.Y.Penal Law §§ 110.00;*

125.25(1)). Finally, "New York Penal Law § 120.10(1) provides that a person is guilty of first degree assault when, '[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or dangerous instrument." *Jackson v. Lacy, 74 F.Supp2d 173, 178(N.D.N.Y. 1999)(McAvoy, C.J.)*.

2. Contrary to, or unreasonable Application of, Supreme Court Precedent

The Third Department, in considering petitioner's challenge to to the sufficiency of the evidence, found that"[t]he people's proof established every element of the crimes." *see Page, 225 A.D.2d at 831, 638 N.Y.2d at 987*. Consequently, this finding must be afforded deference under the AEDPA.

Like the Third department, I also find that the evidence in this case, taken as a whole, is plainly, sufficient to surpass the relatively modest hurdle posed by Jackson. Considered in a light most favorable to the prosecution, the evidence established that when Page

entered Grimsley's home for the last time on the night of the crimes, he turned to Vilaneuva and asked "You think I'm playing? Do you want to die?" Trial Tr. at 701. Petitioner then shot Vilaneuva, mortally wounding him.[9] *Id.* at 757.

The evidence also demonstrated that Page attempted to kill Grimsley and intentionally cause him to suffer from serious physical injury by means of a deadly weapon. Soon after shooting Vilaneuva, petitioner pointed a gun at Grimsley and pulled the trigger. Id. at 702. Although the gun initially misfired, Page subsequently succeeded in shooting him, causing Grimsley to sustain life threatening injuries. *Id.* at 702, 800-02. Thus, the evidence adduced at trial clearly established both that petitioner intended to cause Grimsley's death when he shot him, and that Grimsley sustained serious physical injuries as a direct result of the

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9. According to the evidence at trial, the cause of Vilaneuva's death "was massive hemorrhage because of the bullet's passage through the aorta. Trial Tr.at757

gunshot wound inflicted on him by Page.

Addressing next petitioner's claim that the prosecution failed to disprove his alibi beyond a reasonable doubt(see Dkt.No.1 at 7), I note that after the closing arguments were delivered by counsel, Judge Harrigan instructed the jury that

> The defense has presented what is commonly known as an alibi. You must consider and evaluate the testimony and credibility of the alibi witness just as you would the testimony of any other witness. If the alibi testimony creates a reasonable doubt in your minds that the defendant is the person who committed the crimes under this indictment, you must find himnot guilty. It followa, therefore, that satisfaction beyond a reasonable dout.

Trial Tr. at 1163-64. The jury is presumed to have followed these instructions. *See Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 737(2000); Shariff v. Artuz, No. 97CIV.2882, 2001 WL 135763, at *3(S.D.N.Y. Feb. 16, 2001)(citations*

omitted). Thus although Page presented an alibi at trial, it is evident that the jury found that the prosecution disproved that alibi beyond a reasonable doubt in light of its decision to convict petitioner of the above-referenced crimes.

Finally, although Page argues that Grimsley's testimony was inconsistent and that petitioner's own alibi demonstrated his innocence, in the face of an attack on the credibility of trial testimony, a habeas court, viewing a cold record, may not propely reassess the jury's finding of credibility concerning the testimony of witnesses offered at trial. *Ferguson v. Walker, No. 00CIV1356, 2001 WL 869615, at *5(S.D.N.Y. Aug. 2, 2001)*. "Federal habeas courts aare not free to reassess the fact specific credibility judgments by juries or to weigh conflicting testimony.... On collateral review this Court must presume that the jury resolved any questions of credibility in favor of the prosecution." *Anderson v. Senkowski, No. CV-92-1007, 1992 WL 225576 at *3(E.D.N.Y. Sept. 3, 1992), affd, 992 F.2d 320(2d Cir. 1993); see*

also Fagnon v. Bara, 717 F.Supp. 976, 979(E.D.N.Y. 1989)(habeas court "is not free to make credibility judgments about the testimony presented at petitioner's trial or to weigh conflicting testimony.").

In sum, I cannot say that the Third Department's holding that there was legally sufficient evidence to find Page guilty of all of the crimes, of which he was convicted is contrary to, or represents an unreasonable application of, *Jackson*. Accordingly, petitioner is not entitled to habeas relief under the AEDPA on this theory, and I therefore recommend that ground two of the petition be denied.

3. Ineffective Assistance of Pre-Trial and Trial Counsel

Petitioner argues in his third ground for relief that he recieved ineffective assistance of pre-trial and

trial counsel.[10] Petition (Dkt.No.1 at 8). With respect to his claim regarding pre-trial counsel, he argues that his attorney failed to obtain statements from various individuals whom petitioner appears to allege could have verified his alibi tha he was not at Grimsley's home on the night of the crimes. *Id.* As to his argument regarding trial counsel, petitioner refers this court to the appellate brief filed on his behalf as support for his claim that his trial attorney rendered ineffective assistance.

1. Clearly Established Supreme Court Precedent

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10. Immediately prior to the suppression hearing, Page indicated to Judge Harrigan that he was despleased with the manner in which his then-attorney, Michael Elliott, Esq. had been representing Page. See Transcript of Suppression Hearing (4/14/94)("Suppression Tr.") at 4-15. The parties thereafter agreed, however, that attorney Elliott would represetn petitioner during that hearing. Id. at 18-20. Attorney Elliott was later relieved of his duty of representation, and Page was ultimately represented at trial by Adam Parisi, Esq.

To establish ineffective assistance, a habeas petitioner must show both 1) that counsel's representation fell below an objective standard of reasonableness, measured in light of the prevailing professional norms, and 2) resulting prejudice-that is, the outcome of the proceeding would have been different. *Strickland v. Washington, 466 U.S. 668, 688-90, 104 S.Ct. 2052, 2065-66(1984); see also Aeid v. Bennett, 296 F.3d 58, 62-63(2d Cir. 2002).* In *Taylor*, the Supreme Court declared that "the ru;le set forth in *Strickland* qualifies as "clearly established Federal Law[.]"11 *Taylor, 529 U.S. at 391, 120 S.Ct. at 1512.*

2. Contrary To, or Unreasonable Application of, Supreme Court Precedent

The Third Department rejected Page's claim that he was denied the effective asistance of counsel. *See Page, 225 A.D.2d at 834, 638 N.Y.S.2d at 988.* These claims are thus entitled to

deferential review under the AEDPA.[12]

a) Pre-Trial Counsel

Petitioner argued on appeal that his pre-trial attorney failed to properly "line up various independent witnewwes to confirm [Page's] alibi defense(phone and cab records), live witnesses at the restaurant and laudromat where Eric had been on the day in question." *See* Appellate Brief at 19-20. The Third Department found this aspect of petitioner's appeal to be without merit. *Page, 225 A.D.2d at 834, 638 N.Y.S.2d at 988.* Thus, my review of this aspest of the petition is limited to determining whether the Third

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12. I note that the Supreme Court has recently reiterated that, in considering whether federal habeas relief is mandated when confronted with an ineffectiveness claim, "it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly." Woodford v. Visciotti, ___ U.S.___, 123 S.Ct. 357, 361 (2002)(citation omitted). Rather, federal court intervention is "authorize[d] only when a state-court decision is objectively unreasonable." Id, ___U.S. at ___, 123 S.Ct. at 361

Department's decision was either contrary to, or constituted an unreasonable application of *Strickland.*

Neither the petition nor Page's reply provides support for his claim that either the prepararion or presentation of petitioner's alibi defense was constitutionall inadequate. Specifically, petitioner has not provided the court with either the name of, or statements from, any individuals whom he claims his pre-trial counsel was required to contact in order to provide further support for his alibi. Although Page argues that his attorney's pretrial preparation was inadequate, I note that a petitioner's "[b]ald assertion that counsel should have conducted a more thorough pretrial investigation fails to overcome the presumption that counsel acted reasonably." *Sheedy v. United States, 1997 WL 394664, at *9(N.D.N.Y. July 8, 1997) (Munson, S.J.)(quoting Matura v. United States, 875 F.Supp. 235, 237(S.D.N.Y. 1995)(Strickland, 466 U.S. at 689, 104 S.Ct. at 2065))*. Since petitioner has not presented any evidence which establishes that the conduct of attorney Elliot concerning

Page's alibi defense was constitutionally deficient, I recommend that this aspect of the petition be denied.[13]

b) Trial Counsel

In support of his claim that he recieved inefective assistance of trial counsel, petitioner refers the court to the appellate brief filed on his behalf, in which it was argued that trial counsel wrongfully failed to: 1) inquire as to the manner in which the jury pool was selected; 2) properly cross-examine numerous witnesses for the prosecution; 3) object to the playback for the jury of a videctape depicting Page on June 10, 1993 without the corresponding audio portion of that tape; 4) Cross-exmamine rebuttal witnesses called by the prosecution whose testimony contradicted certain aspects of petitioner's alibi.

In denying this aspect of Page's ineffectiveness claim, the Third Department found that 1) petitioner' strial counsel actively participated in

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13. I note that at the suppression hearing, Judge Harrigan described attorney Elliott as a "seasoned trial layer." Suppression Tr.at13

the proceedings, 2) his attorney's cross-examination of the prosecution witnesses did not amount to ineffective assistance and 3) the record did not support Page's claim that his alibi testimony was not properly presented to the jury. Page, 225 A.D.2d at 834, 638 N.Y.S.2d at 988. Consequently, this claim is entitled to deferential review under the AEDPA.

As to petitioner's claim regarding the jury pool, he appears to argue that because that pool was "compromised of only two African Americans," the manner in which the jury pool was selected was necessarily improper. Appellate Brief at 21; *see* petition(Dkt. No.1 at 8). No evidence has been presented to this court, however, or for that matter to the state courts below, to substantiate such a claim. Courts may not grant habeas relief based solely uponunsubstantiated conclusions, opinions or speculation. *Wood v. Bartholomew, 516 U.S. 1, 8, 116 S.Ct. 7,*

11(1995)(federal courts should not grant "habeas relief on the basis of little more than speculation with slight support"); *Jones v. O'Keefe, No. 99CIV12297, 2000* WL 1290595, at 5 (S.D.N.Y. Sept. 12, 2000)(citations omitted); *Osinoiki v. Riley, No. CV 90-2097, 1990 WL 152540, at 3 (E.D.N.Y. Sept. 28, 1990)*(denying petition for writ of habeas corpus where, inter alia, two of petitioner's bases for relief were based on "nothing more than rank speculation"). In this instance, the petitioner has submitted nothing short of pure surmise to suggest that the jury pool from which the petit jury was drawn was in any way improperly selected. Moreover, my independent review of the voir dire conducted by counsel of the potential jurors (see Trial Tr. at 271-324, 413-460), similarly fails to disclose any basis upon which I could find that Attorney Parisi rendered ineffective assistance regarding the composition of the petit jury. Thus, this aspect of the petition is without substance.

With respect to Page's arguments regarding the cross-examination con-

ducted by trial counsel of several of the prosecution's witnesses, I note that "the conduct of examination and cross-examination is entrusted to the judgment of the lawyer, and an appellate court on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken." *United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998)(citation omitted), cert. denied sub nom. Praise v. United States, 526 U.S. 1164, 119 S.Ct. 2059(1999); see also United States v. DeFeo, No. 90 CR 250, 1997 WL 3259, at 16 (S.D.N.Y. Jan.6, 1997)(citations omitted), aff'd 152 F.3d 921 (2d Cir. 1998), see, e.g., United States v. Eisen, 974 F.2d 246, 265 (2d Cir. 1992)*(no ineffective assistance despite claim that lawyer failed to thoroughly impeach prosecution witnesses because decisions as to nature and extent of cross-examination are strategic), *cert. denied, 507 U.S. 1029, 113 S.Ct. 1840 (1993).*

My review of the trial transcripts as it relates to the witnesses referenced by petitioner in support of this aspect of his petition does not

support his request for relief. With respect to patrolman Anthony DiCarlo of the Schenectady Police Department, for example, although Page accurately notes that his trial counsel did not cross-examine this witnesses, he fails to note that trial counsel lodged numerous objections during the course of DiCarlo's direct testimony, all of which were sustained, and conducted an extensive voir dire regarding the report created by DiCarlo on the day of the shootings described the perpetrator. See Trial Tr. at 560-69. Counsel thereafter succeeded in having that report excluded from evidence. Id. at 570.

With respect to Investigator Lincoln Grimm of the Schenectady Police Department, in addition to cross-examining this witness, petitioner's trial attorney actively participated in the direct examination of Investigator Grimm, lodging nearly twenty objections during the course of his testimony, the majority of which were sustained by Judge Harrigan. Id. at 574-616. Trial counsel also actively participated in the direct examination of Detective McHugh, interposing objections

throughout the course of his testimony. Id. at 617-35. With respect to the testimony offered by Grimsley's wife, trial counsel lodged numerous objections, nearly all of which were sustained by Judge Harrigan throughout her testimony, and thereafter cross-examined her at the conclusion of her direct testimony. Id. at 636-63. Finally, Page's trial attorney was actively involved in the direct examination of Grimsley (id. at 676-716), and extensively cross-examined him. Id. at 716-43.[14]

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14. I note that in response to a letter from petitioner, Attorney Parisi offered some insight regarding his trial tactics as to his method of cross-examining prosecution witnesses. In that communication, he advised Page that, based upon his experience, the assistant district attorney who tried the case on behalf of the prosecution,

> get[s] the most basic testimony from a witness on direct examination; his expectations [are] then that the defense will raise many issues or "open the door", during which time [he] learns many facets of the case; and then on re-direct, he will highlight certain portions of the witnesses

(cont...)

With respect to the videotaped evidence played to the jury, petitioner faults his trial counsel for failing to object to the playing of that evidence to the jury without the corresponding audio portion of that tape. See Appellate Brief at 25-16; Petition (Dkt. No 1) at 8. It must be noted however, that just prior to the time that the videotape was to have been played to the jury, Judge Harrigan voiced his opinion that he believed that the audio portion of the tape "should [not] be allowed in front of the jury." Trial Tr. at 604. In

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(...cont)

> [sic] testimony and attempt to get the last word from that witness.

See, Letter from Attorney Parisi to Page (10/16/97)(Ex.No.4 to Article 440. Motion) at 2. The letter continued:

> I have seen many istances where [a] defense attorney, in my view, makes the mistake of conducting a full and searching cross-examination, with the effect that such cross-examination places items and information before the jury which would never have been placed before the jury based upon [the]direct examination.

Id.

light of Judge Harrigan's explicit statement that the audio portion could not properly be played for the jury, it would have been fruitless for Page's trial counsel to thereafter request that this portion of the tape be heard by the jury.

Petitioner next argues that his trial counsel "improperly presented" his "alibi testimony" to the jury. See Appellate Brief at 26; Petition (Dkt. No. 1) at 8. Page claims, inter alia, that both he and his brother were "ill prepared to testify" and that other witnesses should have been called to buttress petitioner's alibi. E.g. Appellate Brief at 26-27. The Third Department rejected this aspect of Page's appeal, finding that "[t]he record offer[ed] no support for [Page's] claim that defense counsel improperly presented his alibi testimony or should have called other witnesses for alibi support." *Page, 225 A.D.2d at 834, 638 N.Y.S.2d at 988*. This claim is thus entitled to deferential review under the AEDPA.

Petitioner has not presented any evidence which indicates that this

aspect of the Third Department's decision was contrary to, or involved an unreasonable interpretation of, Strickland. Rather, he simply cites the Appellate Brief filed on his behalf in support of this claim. This claim, however, overlooks the firmly established principle that [t]he decision to call or bypass particular witnesses is peculiarly a question of trial strategy ... which courts will practically never second-guess." *United States ex rel. Walker v. Henderson, 492 F.2d 1311, 1311, 1314 (2d Cir. 1974)(citations omitted); see also, United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997).* Such a strategy "is a tactical decision of the sort engaged in by defense attorneys in almost every trial." *Collier v. United States, 92 F.Supp.2d 99, 103 (N.D.N.Y. 2000)(McAvoy, J.)(quoting United States v. Eisen, 974 F.2d 246, 265 (2d Cir. 1992)(internal quotation omitted))*. Petitioner has not presented any evidence that demonstrates that his trial attorney's conduct regarding the presentation of Page's alibi to the jury was objectively unreasonable, and has thus failed to establish that the Third

Department's decision rejecting this aspect of his appeal was either contrary to, or constituted an unreasonable application of, Strickland.

The final aspect of petitioner's ineffectiveness claim focuses upon the cross-examination of the witnesses called by the prosecution to rebut certain aspects of Page's alibi. See Appellate Brief at 27-28; Petition (Dkt. No. 1) at 8. The rebuttal witnesses called by the prosecution testified that it was on the day of the picnic at which petitioner was present (Trial Tr. at 1041, 1045-46), and that there was no measurable precipitation on May 28, 1993 in Schenectady.[15] Petitioner has not presented any evidence which indicates that the Third Department's finding that his trial counsel's advocacy with respect to these rebuttal witnesses did not rise to the level of ineffective assistance (*see Page, 225 A.D.2d at 834,*

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15. The meteorologist called by the prosecution on rebuttal testified that the afternoon of May 28, 1993, was "sunny and favorable," and that on Monday, May 31, 1993, "[i]t was rainy and wet in the afternnon and into the early evening." Trial Tr.at1057-68.

638 N.Y.S.2d at 988), was either contrary to or constituted an unreasonable application of, Strickland. I therefore find that this aspect of the petition is without substance.

In sum, I cannot say that the Third Department's holding that petitioner received effective assistance of counsel is contrary to, or represents an unreasonable application of, Strickland. Accordingly, Page is not entitled to habeas relief under the AEDPA on this theory, and I therefore recommend that ground three of the petition be denied.

4. Ineffective Assistance of Appellate Counsel

In further support of his request for federal habeas intervention, petitioner claims he received ineffective assistance of appellate counsel. Specifically, he claims that his appellate counsel improperly failed to argue on appeal that the two photographs taken of Page after his arrest on June 10, 1993 were inadmissible because they were "fruits of an unlawful arrest." Petition (Dkt. No. 1) at 9-10.

1. Clearly Established Supreme Court Precedent

Claims alleging ineffective assistance of appellate counsel are analyzed under the Strickland test. *Sellen, 261 F.3d at 314-15.* To prevail upon such a claim, a petitioner must demonstrate that his or her appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Clark v. Stinson, 214 F.3d 315, 322 (2d Cir.), cert. denied, 531 U.S. 1116, 121 S.Ct. 865 (2001).* Appellate counsel cannot be considered ineffective for making a strategic decision to abandon weaker arguments, and instead developed only those arguments more likely to succeed. *Kae v. Artuz, 2000 WL 1738339, at 5 (E.D.N.Y. Nov. 21, 2000)(citing Jones v. Barnes, 463 U.S. 745, 753, 103 S.Ct. 3308, 3313 (1983)*("[a] brief that raises every colorable issue runs the risk of burying good arguments ... in a verbal mound of strong and weak contentions")); *see also Parke v. U.S., No. 97-CV-526, 1999 WL 242637, at 3 (N.D.N.Y. Apt. 22, 1999)(McCurn, S.J.), aff'd, 2002 WL 109475 (2d Cir. 2002), cert. denied, ___*

U.S. ___, 123 S.Ct. 224 (2002).

2. Contrary To, or Unreasonable Application of, Supreme Court Precedent

The Third Department denied petitioner's coram nobis application, in which he alleged, inter alia, that his appellate counsel wrongfully failed to argue on appeal that Judge Harrigan erred when he allowed the photographs taken of Page at the police station to be used against him at his trial. *See People v. Page, No. 79659, slip op. at 1 (3d Dept. July 25, 1997), leave dismissed, 90 N.Y.2d 908, 686 N.E.2d 232 663 N.Y.S.2d 520 (1997).* Accordingly, my review is limited to determining whether the Third Department's decision denying petitioner's coram nobis application was either contrary to, or constituted an unreasonable application of, Strick-

land. [16]

Page claims that he was taken into custody because drugs were found on his person on June 10, 1993, and that the pictures thereafter taken of him by the police were incident to that arrest. Petition (Dkt. No. 1) at 9-10. He argues that because there was no legal basis for his arrest, the "fruits of such arrest" - which included the photographs taken of petitioner - should not have been admitted into evidence at trial. Id.at 10.

However, this argument appears to overlook Detective McHugh's testimony at trial that on June 10, 1993, Grimsley positively identified Page as the assailant. See Trial Tr. at 668-71. A fair reading of Detective McHugh's testimony

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16. Although the Third Department denied petitioner's application of a writ of coram nobis without referring explicitly to the Sixth Amendment or relevant federal case law, there is no basis for believing that the court rejected the claims on non-sustantive grounds. As such, the adjudication was "on the merits," and is therefore subject to review under the deferential standards prescribed in 28 USC § 2254(d)(1). See Sellan, 261 F.3d at 314.

reveals that petitioner was taken into custody for questioning regarding his involvement in that shooting, and not merely because drugs had been found on Page's person as is now urged by petitioner. Id. at 617-35.[17,18] Page has not presented any evidence, in either his petition or traverse, that indicates that the Third Department's finding that petitioner's appellate counsel did not render ineffective assistance by failing to challenge on appeal the denial of trial counsel's apparent request to suppress the photographs taken of Page on June 10, 1993, was either contrary to, or constituted an

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17. The video surveillance of the Craig Street area in Sechenectady was conducted in the presence of Grimsley in order to determine whether he could identify the individual who had shot him the previous month. Trial Tr.at 620-23.

18. At the suppression hearing, Detective McHugh testified that Page was taken to the police station on June 10, 1993, for questioning in connection with the murder of Vilaneuva and teh attempted murder of Grimsley. Suppression Tr.at 44. He also stated that at that time, petitioner was a suspect in those crimes. Id.at50;122.

unreasonable application of, Strickland.[19] I accordingly recommend that this aspect of his petition be denied.

5. Denial of Article 440 Motion

In his final ground for relief, Page argues that Judge Eidens wrongfully denied his Article 440 motion on procedural grounds. Petition (Dkt. No. 1) at 10. Specifically, he contends that his Article 440 application, which alleged ineffective assistance of trial counsel, was based upon matters outside the trial record, and that therefore Judge Eidens

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19. Althought the motion to suppress filed by trial counsel did not explicitly state that it was seeking an order suppressing the photographs taken of Page at the police station, it is broadly enough worded to encompass this claim. If, however, trial court failed to seek the suppression of those photograph prior to trial, appellate counsel would have been procedurally barred from raising this suppression issue for the first time on appeal. See eg Nelson v. Smith, 618 F. Supp. 1186, 1195-96 (SDNY 1985)(citation omitted). In that event, appellate counsel could notbe found to have rendered ineffective assistance for failing to argue this matter in his appllate brief.

improperly denied that motion pursuant to CPL § 440.10(2)(a).[20] Petition (Dkt. No. 1) at 10-12.

This portion of Page's petition neglects to acknowledgedge, however, the fact that "[a]ll the circuits that have considered the issue, except one, have held that federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings." *Jones v. Duncan, 162 F.Supp.2d 204, 217 (S.D.N.Y. 2001)(internal quotations omitted)(collecting cases)*. Although the Second Circuit has not explicitly ruled on this issue, district court decisions within this circuit have denied applications for habeas relief for this reason. *See, e.g., Ballard v. Filion, No. 99-CV-0601 (N.D.N.Y. July 10, 2002)*(Hurd, J., adopting Report-Recommendation of Magistrate Judge Randolph F. Treece which opined that no error on the part of the county court entitled petitioner to habeas relief);

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20. CPL § 440.10(2)(a) bars litigants from raising claims in an Article 440 motion that have already been litigated on appeal. Id; Ramirez v. Attorney General of State of New York, 280 F.3d 87, 89 (2nd Cir. 2001)

Jones, 162 F.Supp.2d at 219 (petitioner's "assertion that the failure to hold a hearing on his CPL §§ 440.10 and 330.30 ... motions violated due process is not cognizable on federal habeas review"); *Sparman v. Edwards, 26 F.Supp.2d 450, 468 n. 13 (E.D.N.Y. 1997), aff'd, 154 F.3d 51 (2d Cir. 1998); Turner v. Sullivan, 661 F.Supp. 535, 540-41 (E.D.N.Y. 1987)*("A writ of habeas corpus may not be issued on the basis of a perceived error of state law."), *aff'd, 842 F.2d 1288 (2d Cir.), cert. denied, 487 U.S. 1240, 108 S.Ct. 2913 (1988)*. Since any alleged error on the part of Judge Eidens in denying petitioner's Article 440 motion would not entitle Page to federal habeas relief. I could recommend that the fifth ground be summarily dismissed on the basis. I note, however, that this ground is also substantively without merit.

"A dismissal under § 440.10(2)(a) is not based on any procedural default. To the contrary, it is premised on a prior decision." *Taylor v. Kuhlmann, 36 F.Supp.2d 534, 546 (E.D.N.Y. 1999)(citations and footnote omitted)*. Since Judge Eidens expressly relied on

CPL § 440.10(2)(a) in denying petitioner's Article 440 application (see May, 1998 Order), I cannot properly find that the county court relied on a procedural bar in denying that motion.[21] *Taylor, 36 F.Supp.2d at 546.*

Petitioner argues that his trial counsel rendered ineffective assistance because he erroneously believed that if he offered evidence at trial to the effect that Grimsley and his wife had previously identified another individual - Michael A. Cruz - as Grimsley's as-

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21. Since the allegations asserted in Pages' Article 440 motion were not specifically argued in the appellate brief filed with the Third Department, it is possible that Judge Eidens may not have properly relied upon § 440.10(2)(a) in denying petitioner's Article 440 motion, as is now urged by petitioner. Eg Taylor, 36 F.Supp.2d at 546 n. 11. Nonetheless, since a denial of a claim under § 440.10(2)(a) is not one based upon a procedural default, I cannot find that Judge Eidens "clerly and expresly" dismissed Pages Article 440 motion due to his procedural default. See Taylor, 36 F.Supp.2d at 546 n.11. Thus, any review of such claim should consider its merits, according appropriate deference to Judge Eidens's factual finding. Id.

sailant, counsel would have opened the door to damaging re-direct testimony on the part of the prosecution. Petition (Dkt. No. 1) at 10-11; see also Article 440 motion at 5-8. Page also argues that Judge Eidens wrongfully failed to consider the merits of petitioner's Article 440 motion despite the fact that such application established that Attorney Parisi never reviewed a "lead sheet" created by the police which stated that a confidential informant had advised authorities that Alexander Llanos had committed the crimes. Petition (DKt. No. 1) at 11; see also Article 440 motion at 1-5.

It is pure conjecture, however, that Attorney Parisi was "erroneous" in his belief that his questioning of prosecution witnesses concerning the misidentification of another suspect would have opened the door to damaging testimony on re-direct examination, including introduction of the standardized incident report created by patrolman Dicarlo in

which he described the assailant.[22] Although petitioner now firmly believes that no damaging re-direct testimony could have offered against him had his trial attorney pursued an alternative course of cross-examination (see Petition (Dkt. No. at 11)), such belief is at most speculation on the part of petitioner, and cannot serve as a basis upon which to grant habeas relief. *Wood, 516 U.S. at 8, 116 S.Ct. at 11; Jones, 2000 WL 1290595, at 5 (citations omitted); Osinoiki, 1990 WL 152540, at 3.*

As to the second argument asserted by Page in this aspect of his petition, he argues that "trial counsel conceded that at trial he did not review the lead sheet by the police informant, which stated that Alexander Llanos actually committed the crimes." Petition (Dkt. No. 1) at 11. Attorney Parisi informed petitioner that he could not "specifically recall reviewing the lead sheet to your letter." See Exhibit H to Article 440 motion. He then stated, however,

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22. The court was not provided with a copy of that report, which was identified at trial as People's Exhibit no.10.

that he could not "accurately state [that he] did not review that lead sheet." Id. Thus, the letter upon which this aspect of petitioner's Article 440 motion - and the present habeas petition - relies does not support Page's assertion that his trial attorney never reviewed the lead sheet; rather, it merely states that Attorney Parisi could not recall whether he had engaged in such a review.[23]

Thus, even reviewing the merits of this claim, I find that Page has not presented any evidence, in either his petition or reply, that indicates that the Third Department's finding that petitioner's trial counsel did not render ineffective assistance in the manner suggested by Page in his Article 440 motion was either contrary to, or constituted an unreasonable application of, Strickland. Accordingly, I recommend that this aspect of his petition be denied.

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23. That letter was written by Attorney Parisi in January, 1998; petitioner's trial was conducted in November, 1994.

IV. SUMMARY AND RECOMMENDATION

In sum, I find that federal habeas relief based upon the claims asserted in his fifth ground for relief is unavailable. Additionally, I find that each of the five grounds raised by Page in his petition lacks merit. It is therefore hereby

RECOMMENDED, that petitioner's petition be DENIED and DISMISSED in its entirety.

NOTICE: pursuant to 28 U.S.C. § 636(b)(1), the parties have ten (10) days within which to file written objections to the foregoing report-recommendation. Any objections shall be filed with the clerk of the court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993).

It is further ORDERED that the Clerk of the Court serve a copy of this report and recommendation upon the parties by regular mail.

/s/ _____
David E. Peebles
U.S. Magistrate Judge

Dated: December 4, 2002
Syracuse, NY

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 9:98-CV-1916(TJM/DEP)

[Filied April 16 2003]

ERIC PAGE,

Petitioner,

against-

DOMINIC MANTELLO,

Respondent.

McAvoy, D.J.

DECISION AND ORDER

Petitioner appeals from Magistrate Judge David E. Peebles' December 4, 2002 Order denying and dismissing his request for federal habeas relief.

Because objections have been filed,

the Court has reviewed the record *de novo*. *See 28 U.S.C. §636(b)(1)*. After such a review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The Court may also receive further evidence or recommit the matter to the magistrate judge with instructions." *Id.*

Having considered the record *de novo*, the Court affirms for the reasons stated in Magistrate Judge David E. Peebles' December 4, 2002 Order. Petitioner's oblections raise no new issues and lack merit as all have been addressed previously by the Court.

It is therefore **ORDERED**, Petitioner's petition be **DENIED** AND **DISMISSED IN ITS ENTIRETY.**

IT IS SO ORDERED.

April 16, 2003

/s/_____

Hon. Thomas J. McAvoy
U.S. District Judge

APPENDIX D

LETTER TO ATTORNEY ADAM G. PARISI DATED SEPTEMBER 1997

Eric Page 95A1200
Coxsackie Corr. Fac.
Box 999
Coxsackie, New York 12051

Mr. Adam G. Parisi, Esq.
224 State Street
Schenectady, New York 12305
September 18, 1997

RE: PEOPLE V. PAGE IND# 593-15

Dear Mr. Parsis,

My intention of this letter is to inquire into some of the decisions that you made during the course of my trial. Of course, I may question a few of your decisions that you made and it will be appreciated if you respond as soon as possible.

I know it has been long since you represented me, so I have provided a brief factual background of my case, a discussion, and questions.

Background:

On May 28th-29th, 1993, a man named Marvin Grimsley was shot by a man that sold him crack cocaine on 3 different occasions that day. He testified at trial that he smoked a large quantity of crack and had a few beers that day. On the third meeting Mr. Grimsley had a scuffle with the shooter and his partner. The shooter and two more individuals returned to Grimsley's house and shot Mr. Grimsley and his friend. His friend died. Two weeks later I was identified by Mr. Grimsley. There was no other identification testimony provided except the in-court identification by Grimsley.

At trial the district Attorney offered two arrest photographs of me to corroborate Mr. Grimsley's testimony that the shooter had a scar on the right cheek.

My defense was that Mr. Grimsley's recollection was effected by the

ingestion of crack cocaine.

Discussion:

As I reviewed the record I noticed a document by a confidential informant that completely exonerated me of the crimes I was charged with (Exhibit "a" attached hereto), and to an extent it corroborated the testimony of Mr. Grimsley and his wife. This document was never offered into evidence at trial, thus, the jury was unaware of its existence. I would say that this document also corroborated our theory of defense.

There is a photo array lead sheet by both Mr. & Mrs. Grimsley identifying Micheal Cruz as being a participant in the shooting (Exhibits "b" & "C"). Micheal Cruz was also identified as being a participant in the shooting by the informant in exhibit "A". This evidence could of certainly casted further doubt on Grimsley's credibility and the District Attorney's case.

As credibility is concerned, there was testimony by Mr. Grimsley that he specifically remembered a scar on the right side of my face. However, you did

not offer or make aware to the jury that I was subjected to a highly suggestive pretrial show-up in which was part of the subject during the pretrial wade hearing. I was placed in front of Mr. . Grimsley approximately 10 feet away, for about 15-20 minutes, by myself without counsel and this happened in the court room. There were no mentions of a scar on the shooters face prior to that "show-up".

You also never objected to the in-court identification based on the above mentioned "show-up".

Finally, you did not object to the admission of my arrest photographs on the ground that they were the product of an illegal arrest. Indeed the arrest was illegal. The facts that were unfolded during the pretrial hearings, as you read, was that on June 10, 1993 I was identified by Mr. Grimsley. Upon that identification Investigator McHugh radioed nearby police and told them that I was wanted for questioning concerning a homicide (See Exhibit "D", "E", and "T"). That McHugh's sole purpose was to take me in for questioning. That when I was located a protective pat-down search

was conducted. That after feeling nothing suspicious Police Officer Messere invaded my various pockets. That I was arrest at that time for the concerning a homicide.

Finally, that I was booked and charged only for the contraband and two photographs were taken.

People v. Evans, 43 N.Y.2d 160 (1977) is binding on my case. In Evans the Court of Appeals held that without a contemporaneous arrest such a warrantless search is violative of constitutional rights. At 162. The court stated that unless and until a person is arrest, a full body search without a warrant or exceptional circumstances is constitutionally unreasonable. Also, that an arrest is a essential requisite to search incident. At 165.

I was not arrest for anything at the time of the stop. I was just place against a wall until completion of the protective patdown search because I was suspected as the shooter.

Questions:

1. Why did you not offer the confidential lead sheet (Exhibits "A") into evidence at trial ?

2. Why did you not offer the photo array sheets of Mr. & Mrs. Grimsley at trial?

3. Why did you not bring out the suggestive "show-up" to prove that Grimsley tailored his testimony ?

4. Why did you not object to the in-court identification of me by Grimsley on the grounds that the suggestive show-up tainted any subsequent identifications ?

5. Why did you not object to the photographs as being the product of an illegal arrest as stated above ?

Thank you in advance for your time and cooperation. In this very important matter I humbly await your expedient reply.

Yours truly,

/s/_____

Eric Page

Xc:

Steven C. Krane, Chair

N.Y.S. Bar Assn,Review the Code of Prof. Responsibility cmt.

Proskauer Rose et al

1585 Broadway, 17th Fl

New York, N.Y. 10036-8200

Files

APPENDIX D'

RETURN LETTER FROM ATTORNEY PARISI
DATED OCTOBER 16, 1997

Eric Page
Inmate Number 95-A-1200
Coxsackie Correctional Facility
Box 999
Coxsackie, NY 12051

Re: People v. Page
Indictment No. 593-15

Dear Mr. Page:

I have reviewed both of your letters dated September 18, 1997 as well as the documents that accompanied the second September 18, 1997 letter.

I am not able, due to the lapse of

time between your trial and today, to specifically address your questions. I can however offer some very general comments regarding the trial strategy. One of the items on which I focused, was the police report created by the first patrolman that arrived on the scene. That report contained a description from Marvin Grimsley concerning the physical characteristics of the shooter. I was successful in keeping that document from evidence, and thus successful in keeping the jury from learning that Mr. Grimsley's initial description closely, or exactly, matched your physical characteristics. My concern with delving into other identification issues, was that such a procedure would "open the door" and allow Mr. Gebell to introduce that original police report, and thus frustrate my initial efforts to minimize the identification testimony.

I do recall reading in voluntary disclosure references to Michael Anthony Cruz. Again, I cannot offer a specific response to your concern about the identification of him by the Grimsleys. It is my recollection that Mr. Cruz had several alibi witnesses, and that the

Grimsleys did not identify him as the shooter. My goal was to minimize the identification testimony; I was always concerned with "opening the door" to allow other testimony which matched your physical description.

After the verdict, I spoke with one of the jurors. He informed me that the jury thought that you and your brother lied, and that they were further distrustful of you and your brother based upon the refusal by you and your brother to answer questions unless the questions were specifically related to the time of the shooting. The problem with the defense case was further complicated by the fact that your ex-girlfriend refused to discuss the case with me, despite your promise that she would provide an air-tight alibi.

I attempted to tailor the defense in accordance with the trial strategy of Mr. Gebell. Mr. Gebell is notorious for sandbagging the defense. By that I mean, that his direct examination of his witnesses is pathetic, and he makes his gains during re-direct examination. His scenario works as follows: he will get the most basic testimony from a witness

on direct examination; his expectations is then that the defense will raise many issues or "open the door", during which time Mr. Gebell learns many facets of the case; and then on re-direct, he will highlight certain portions of the witnesses testimony and attempt to get the last word from that witness. I view his style as one of sandbagging a potential defendant, in that Mr. Gebell's direct examination is always lacking in specificity and exploration or issues. I have seen many instances where defense attorney, in my view, makes the mistake of conducting a full and searching cross-examination. with the effect that such cross-examination places items and information before the jury which would never have been placed before the jury based upon Mr. Gebell's direct examination.

I encourage you to raise your concerns in an Article 440 motion or an habeas corpus proceeding.

Very truly yours,

/s/Parisi,Englert,Stillman,Coffey & Mchugh

APPENDIX D

SECOND LETTER TO ATTORNEY PARISI DATED DECEMBER 23, 1997

Eric Page
Din# 95A1200
Box 999
Coxsackie, NY 12051

Adam G. Parisi,Esq.
224 State Street
Schenectady, NY 12301

December 23, 1997

RE: People v. Page
Indictment number 593-15

Dear Mr. Parisi:

I have received your letter dated October 16, 1997, which offered comments regarding the trial strategy.

I have just one more question regarding your representation during my case, in which your letter did not make quite clear of. In my letter I asked you about a Police lead Sheet that

implicated an Alexander Llanos as the shooter (See Lead Sheet attached hereto), as well as your failure to offer it as trial. Your letter does not make clear whether you knew that this lead Sheet existed at the time of trial or not. In fact, you make no mention of this evidence whatsoever in your in your letter (See letter attached hereto).

It will be appreciated very much if you could tell me whether you had knowledge of this Lead Sheet at the time of trial.

Yours Truly,
/s/
Eric Page

EP/enc.
cc:files

Committe on Professional Standard
Third Dept.
A.E. Smith State Office Building
Box 7013, Capitol Station Annex
Albany, NY 12225

APPENDIX D

RETURN LETTER FROM ATTORNEY PARISI DATED JANUARY 5, 1998

Dear Mr. Page:

I do not specifically recall reviewing the lead sheet attached to your letter. However, I am not able to accurately state I did not review that lead sheet.

Verly truly yours,

/s/Parisi,Englert,Tillman,Coffey & Mchugh

Adam G. Parisi

AGP/vm

APPENDIX D

ORDER OF THE SCHENECTADY COUNTY COURT DENYING CPL § 440.10 MOTION DATED MAY 12, 1998

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

ERIC PAGE,
Defendant.

Eidens, J.

Upon a Notice of Motion filed by defendant under CPL 440 to vacate judgment and upon the papers submitted therewith and upon the responding papers of the People it is the decision of this Court that it must deny defendant's motion pursuant to Criminal Procedure Law Section 440.10(2)(a). The Court must

deny a motion made under CPL 440 when the issue raised in the motion has been determined on the merits upon an appeal from the judgment. The defendant seeks to vacate his conviction on the basis of ineffective assistance of counsel. A review of defendant's brief and Appendix A (defendant's appellate brief) demonstrates that the issue raised here, ineffective assistance of counsel, was previously raised and determined on appeal. Therefore, the Court must deny defendant's motion pursuant to CPL 440.10(2)(a).

It is therefore

ORDERED, that defendant's motion is hereby denied.

/s/_____
Hon. Micheal C. Eidens
Schenectady County Court
Judge

Dated: May 12, 1998

FOLD-OUT EXHIBIT

SCHENECTADY POLICE DEPARTMENT
INVESTIGATIVE SERVICES BUREAU-LEAD SHEET (51)

DD CASE #: 1534	NATURE OF CASE: HOMICIDE
LEAD RECEIVED BY: SH	DATE: 5/31
SOURCE: PTL WALSH.	
ASSIGNED TO:	DATE: BY:
TIME ASSIGNED:	DATE & TIME RETURNED:

LEAD DESCRIPTION: CONFIDENTIAL DISCLOSURE TO PTL WALSH FROM ~~[redacted]~~ INFORMANT. 2 PARTIES HAD BEEN AT 737 STATE ST PRIOR TO SHOOTING, "PARTYING". HAD JUST LEFT AND HAD ARGUMENT, SHOOTS. A THIRD PARTY RAN FROM 737 STATE POINTED GUN AT THESE 2, TELLING THEM HE HAD "SHOT MY FRIEND". THIS THIRD PARTY IS ALLEGED TO BE ALEXANDER LLANOS.

I.D. OF THESE OTHER PARTIES ARE:

1. MICHAEL ANTHONY CRUZ 04/30/71
410 MANCHESTER RD. —

2. A BLACK MALE "JOE" FROM STATE ST.

SUBJECT #1 IS SUPPOSED TO BE EMPLOYED AT KINGSWAY JOBS. IF THIS DOES NOT CHECK OUT THERE IS A SECOND MICHAEL A. CRUZ AT 230 SCHERMERHORN DOB 05/13/70

RESULTS OF FOLLOW-UP: SEE LEAD SHEET 6 J

FURTHER ACTION REQUIRED: YES NO

IF YES EXPLAIN:

COPY

INVESTIGATOR'S SIGNATURE: SH LC

DATE: 6/2/05

LIST ALL PERSON(S) INTERVIEWED: INCLUDE DATE, TIME, DOB, ADDRESS, EMPLOYMENT, HOME AND BUSINESS PHONE #S

EXHIBIT D-81

BEST AVAILABLE COPY

FOLD-OUT EXHIBIT

CITY OF SCHENECTADY POLICE DEPARTMENT

INVESTIGATION DIVISION

PHOTO-ARRAY DISPLAY RECORD:

DATE: June 9 1993 TIME COMMENCED: 4:31 pm LOCATION: Schenectady Police

LAW ENFORCEMENT OFFICERS PRESENT: Inv Lincoln Grimm

WITNESSES: Marvin Grimsley

PHOTOGRAPH ARRAY IDENTIFICATION NUMBER: SO 93-1534-009A
PHOTOGRAPH ARRAY COMPOSED BY: Inv Grimm DATE:

INSTRUCTIONS TO BE READ TO WITNESS:

IN A MOMENT I AM GOING TO SHOW YOU A GROUP OF PHOTOGRAPHS. TAKE YOUR TIME AND CAREFULLY LOOK AT ALL OF THE PHOTOGRAPHS BEFORE YOU MAKE ANY DECISION. THIS GROUP OF PHOTOGRAPHS MAY OR MAY NOT CONTAIN A PICTURE OF THE PERSON WHO COMMITTED THE CRIME IN BEING INVESTIGATED. KEEP IN MIND THAT HAIR STYLES, BEARDS AND MOUSTACHES MAY BE BE EASILY CHANGED. ALSO, PHOTOGRAPHS MAY NOT ALWAYS DEPICT THE TRUE COMPLEXION OF A PERSON — IT MAY BE LIGHTER OR DARKER THAN SHOWN IN A PHOTOGRAPH. PAY NO ATTENTION TO ANY MARKINGS OR NUMBERS THAT MAY APPEAR ON THE PHOTOGRAPHS OR ANY OTHER DIFFERENCES IN THE TYPE OR STYLE OF THE PHOTOGRAPHS. WHEN YOU HAVE LOOKED AT ALL THE PHOTOS, TELL ME WHEATHER YOU SEE ANYONE YOU RECOGNIZE. DO NOT TELL OTHER WITNESSES THAT YOU HAVE OR HAVE NOT IDENTIFIED ANYONE.

QUESTION #1: DO YOU SEE ANYONE YOU RECOGNIZE? ANSWER: Number Three That Looks Like Him

QUESTION #2: IF THE ANSWER TO QUESTION ONE WAS AFFIRMATIVE, IDENTIFY BY NUMBER THE PHOTO OR PHOTOGRAPHS THAT YOU RECOGNIZE: ANSWER: Number Three was standing in my Door between the two Black Guys

QUESTION #3: FROM WHERE DO YOU RECOGNIZE THE PERSON (S) IDENTIFIED?
ANSWER: From being at my House the night I was shot

QUESTION #4: DO YOU HAVE ANY ADDITIONAL COMMENTS?
ANSWER:

WITNESS'S SIGNATURE: Marvin Grimsley
DATE: June 9, 1993 TIME: 4:37 PM
LOCATION: SPD DD

INVESTIGATOR'S SIGNATURE: Lincoln Grimm

EXHIBIT D-32

"MUG" SHOW-UP FOLDER

1

2

3

FOLD-OUT EXHIBIT

CITY OF SEATTLE POLICE DEPARTMENT

INVESTIGATION DIVISION

PHOTO-ARRAY DISPLAY RECORD:

DATE: 6/1/93 TIME COMMENCED: 3:10 PM LOCATION: Room 2 Detective Division

LAW ENFORCEMENT OFFICERS PRESENT: Det. R. McHugh

WITNESSES: Karen Grimsley

PHOTOGRAPH ARRAY IDENTIFICATION NUMBER: 93-1534-05
PHOTOGRAPH ARRAY COMPOSED BY: Det. D. Moran DATE:

INSTRUCTIONS TO BE READ TO WITNESS:

IN A MOMENT I AM GOING TO SHOW YOU A GROUP OF PHOTOGRAPHS. TAKE YOUR TIME AND CAREFULLY LOOK AT ALL OF THE PHOTOGRAPHS BEFORE YOU MAKE ANY DECISION. THIS GROUP OF PHOTOGRAPHS MAY OR MAY NOT CONTAIN A PICTURE OF THE PERSON WHO COMMITTED THE CRIME NOW BEING INVESTIGATED. KEEP IN MIND THAT HAIR STYLES, BEARDS AND MOUSTACHES MAY BE BE EASILY CHANGED. ALSO, PHOTOGRAPHS MAY NOT ALWAYS DEPICT THE TRUE COMPLEXION OF A PERSON -- IT MAY BE LIGHTER OR DARKER THAN SHOWN IN A PHOTOGRAPH. PAY NO ATTENTION TO ANY MARKINGS OR NUMBERS THAT MAY APPEAR ON THE PHOTOGRAPHS OR ANY OTHER DIFFERENCES IN THE TYPE OR STYLE OF THE PHOTOGRAPHS. WHEN YOU HAVE LOOKED AT ALL THE PHOTOS, TELL ME WHEATHER YOU SEE ANYONE YOU RECOGNIZE. DO NOT TELL OTHER WITNESSES THAT YOU HAVE OR HAVE NOT IDENTIFIED ANYONE.

QUESTION #1: DO YOU SEE ANYONE YOU RECOGNIZE? ANSWER: Yes

QUESTION #2: IF THE ANSWER TO QUESTION ONE WAS AFFIRMATIVE, IDENTIFY BY NUMBER THE PHOTO OR PHOTOGRAPHS THAT YOU RECOGNIZE: ANSWER: #3

QUESTION #3: FROM WHERE DO YOU RECOGNIZE THE PERSON (S) IDENTIFIED?
ANSWER: He was with the man that shot my husband and Brad, and he was with the man that they beat my husband on the outside Lounge.

QUESTION #4: DO YOU HAVE ANY ADDITIONAL COMMENTS?
ANSWER: None.

WITNESS'S SIGNATURE: X Karen Grimsley
DATE: 6/1/93 TIME: 3:15 P.M.
LOCATION: Room 2 Detective Division

INVESTIGATOR'S SIGNATURE: Det Robert P. McHugh

EXHIBIT D-83

"MUG" SHOW-UP FOLDER

#1

#2

#3

Karen Grimsley

KM